Assessment of the Intergovernmental Saltwater Fisheries Conflict Between Passamaquoddy and the State of Maine

Maine Indian Tribal State Commission Special Report 2014/1

June 17, 2014

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MITSC commissioners reviewed and provided direction on several preliminary drafts. As part of our preparation process, the MITSC met with the offices of the Governor, the Passamaquoddy Chiefs from Motahkomikuk and Sipayik, the Chief of the Penobscot Indian Nation, the Vice Chief of the Passamaquoddy from Motahkomikuk, the President of the Maine Senate, the Speaker of the Maine House, the house chair of the Judiciary Committee, both chairs of the Marine Resources Committee, and Tribal Councilors from Sipayik. In addition, the Office of the Maine Attorney General was briefed on the contents of the report.

The MITSC extends its appreciation to the staff of the Maine State Law and Legislative Reference Library, the Maine State Archives and the Office of Policy and Legal Analysis for assistance with locating primary material.

The MITSC thanks the Honorable Donald Soctomah, Tribal Historic Preservation Officer of the Passamaquoddy Tribe, for use of the photograph of *Pulpit Rock* in the Passamaquoddy Bay for the cover of this report.

The MITSC Commissioners formally reviewed this report on April 30, 2014 and approved the final version for release on June 17, 2014.

Executive Summary

This report reviews the intergovernmental saltwater fisheries conflict between the Passamaquoddy Tribe and the State of Maine; attempts by the Tribe and the State to negotiate solutions; resulting litigation; Maine legislation affecting Tribal management of the fishery; and the impact of this conflict and the legislation on Tribal-State relations from 1997 to 2014.

The conflict arises from opposing interpretations of how the 1980 federal Maine Indian Claims Settlement Act (MICSA) and the Act to Implement the Maine Indian Claims Settlement (MIA) impact the Passamaquoddy saltwater fishery. The Passamaquoddy Tribe stands on its retained Aboriginal rights to fish within its traditional territory beyond reservation boundaries without interference from the state. They hold that these rights have never been abrogated since they are not mentioned in the extinguishment provisions in the MICSA. The State of Maine maintains that the Tribes have no rights except as specified in the MIA and that the State of Maine has the authority to regulate the Passamaquoddy saltwater fishery and prosecute Passamaquoddy fishers who fish according to Passamaquoddy law rather than state law. The articles of construction in the MICSA read, "In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this Act shall govern."

In 1997, LD 297 was passed to require the Department of Marine Resources to negotiate with the Passamaquoddy. By June, thirteen Passamaquoddy were charged with various violations of state commercial fishing laws. In 1998, despite objections by Maine legislators, a new law was passed. This law (12 M.R.S.A. § 6302-A) changed the sustenance definition specified in the MIA and included a "blow-up" clause, designed by the Office of the Attorney General, which overrode the authority of the Tribe to approve or reject amendments to the MIA. In 2013 and 2014, the state legislature further amended 12 M.R.S.A. § 6302-A and further subverted the Tribe's equal participation with the legislature in amending the Settlement Acts. The legislative and executive branch processes employed to resolve the intergovernmental saltwater fisheries conflict have failed to achieve tribal-state cooperation, and undermined potential for the development of mutually beneficial solutions in a sustainable fishery.

After a complete review of these events, the Maine Indian Tribal-State Commission (MITSC) recommends a process of seeking mutually beneficial solutions that are grounded in respect for and adherence to the MICSA articles of construction and the mutual approval processes for amendments to the MIA. Recommendations to accomplish this aim include federal-tribal-state co-management of marine resources; development of a MOU to address unresolved issues regarding the saltwater fishery conflict and replace 12 M.R.S.A. § 6302-A; development of clear responsibilities and reporting standards for the OAG and the MITSC when reviewing any aspect of the MIA or MICSA; and fully resourcing further inquiry, regular reporting and information sharing among the concerned parties.

We conclude that open dialogue, negotiations, and formal agreements are mechanisms that are both pragmatic and constructive, and have value for all of the people of Maine. We offer this report with sincere hope for a renewed commitment to advance conflict resolution among all of the peoples who live within the State of Maine.

Introduction

In 1980, legislation passed at both the state and federal levels that established specific legal parameters for the settlement of claims by the Passamaquoddy Tribe and the Penobscot Indian Nation for the return of 12.5 million acres of land, roughly 60% of the state of Maine, and damages of 25 billion dollars. A settlement negotiated among the parties became law with the passage of two separate pieces of legislation: the Act to Implement the Maine Indian Claims Settlement, commonly known as the Maine Implementing Act (MIA) and the Maine Indian Claims Settlement Act (MICSA). The MIA (M.R.S.A Title 30, Chapter 601) created the Maine Indian Tribal-State Commission (MITSC, 30 M.R.S.A. § 6212(3)), an intergovernmental organization charged in part to:

Continually review the effectiveness of the Act and the social, economic, and legal relationship between the Houlton Band of Maliseet Indians, Passamaquoddy Tribe, the Penobscot Indian Nation, and the State (30 M.R.S.A. § 6212(3)).[1]

The Maine Indian Claims Settlement Act, (MICSA), 25U.S.C. 1721-1735 was passed in October of the same year. The MICSA gave federal permission for the MIA to take effect while retaining intact the federal trust relationship between the federally recognized tribes of Maine and the US Congress; and placed constraints on the implementation of the MIA. Of particular interest to the inquiry into the saltwater fishery conflict between the Passamaquoddy Tribe and the State of Maine are the following provisions of the federal act:

1. MICSA (25 U.S.C. § 1735 (a)) provides that "In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this Act shall govern." The provisions of the federal MICSA thus override the MIA provisions when there is a conflict between the two.
2. MICSA (25 U.S.C. § 1725 (e)(1)) provides that tribal approval is required for any amendments to the MIA that relate to "the enforcement or application of civil, criminal or regulatory laws" of the tribes and the state within their respective jurisdiction or the allocation of responsibility or jurisdiction over governmental matters between the tribes and the state.

This report reviews:

1. **The emerging conflict of interpretation over the saltwater fishing rights of the Passamaquoddy Tribe beginning in 1983, shortly after the Settlement Acts became law;**
2. **The evidence of good faith negotiations among the Passamaquoddy Tribe, the Maine Department of Marine Resources (DMR), and Governor King's administration to arrive at a solution;**

[1] Originally, the MITSC included representation from the Passamaquoddy Tribe, Penobscot Indian Nation and the State of Maine. It was amended in 2009 to include the Houlton Band of Maliseet Indians.

3. **State law enforcement responses in Passamaquoddy territory and subsequent criminal charges brought against Passamaquoddy fishers;**
4. **The Passamaquoddy response to jurisdictional disputes and resulting litigation**;
5. **The passage of state legislation regarding the management of the Passamaquoddy saltwater fishery (LD 2145)**;
6. **The role of the Maine Office of the Attorney General as advisor to the Maine legislature when they consider new law that may impact the Maine Implementing Act.**

The MITSC 's charge to further examine and report on the Passamaquoddy saltwater fishery was specifically included in LD 2145, and reads in part:

> *The Maine Indian Tribal-State Commission shall study any question or issue regarding the taking of marine resources by members of the Passamaquoddy Tribe and the Penobscot Nation. The commission shall report any findings and recommendations to the Joint Standing Committee on Marine Resources by December 15, 1998.*

To carry out this charge, the MITSC formed a Marine Resources Ad Hoc Committee charged with making recommendations on marine resource issues to the full commission. The MITSC issued its report to the Joint Standing Committee on Marine Resources, as mandated, on December 15, 1998. The report, *Taking of Marine Resources by Passamaquoddy and Penobscot Tribal Members,* indicated that marine resource issues were likely to be ongoing and stated that, "The [Ad Hoc] committee will discuss these issues and questions, undertake any research required and bring forward the issues and questions as agenda topics for the meetings of MITSC . . . MITSC will share any findings and recommendations with the Joint Standing Committee on Marine Resources and the Tribal Councils." (Addendum 1)

In the preparation of this report, the MITSC conducted an extensive search for and a comprehensive review of primary material available in the public domain. The primary documents examined by the MITSC were, for the most part, State of Maine records. While this report focuses specifically on the saltwater fishery, one of many areas of interest to the MITSC, more materials from these and other federal and tribal sources need to be comprehensively examined in order to fully assess the tribal-state relationship relative to the settlement acts.

Relying on both its statutory responsibility in 30 M.R.S.A. § 6212(3) and its charge pursuant to 12 M.R.S.A. § 6302-A, the MITSC offers the following report.

Section I: Emergence of the Conflict and Attempts to Resolve Saltwater Fishery Issues

Passamaquoddy Bring Emerging Saltwater Conflicts to the MITSC

A review of the MITSC minutes reflects that the Passamaquoddy Tribe began raising the saltwater fishing issue as early as 1984 (Addendum 2). The MITSC's participation in the resolution of saltwater fishery and marine resource issues relative to the MICSA and the MIA commenced in earnest in 1994 when, at the request of the Passamaquoddy Tribe, the MITSC hosted and staffed a meeting attended by Cliv Dore, Passamaquoddy governor at Pleasant Point; Fred Hurley, MITSC commissioner, State of Maine; and William Brennan, commissioner of the DMR. A set of notes taken by then MITSC Executive Director Diana Scully during this meeting reflect the following issue areas:[2] (Addendum 3)

1. Passamaquoddy saltwater licensing provisions;
2. Increased DMR law enforcement presence in Downeast Maine resulted in the first arrest of a Passamaquoddy fisher for fishing without a license;
3. Dealers were not buying Passamaquoddy harvested clams because Passamaquoddy harvesters were not licensed by the state;
4. Regulatory restrictions on the sea urchin fishery that were passed by the Maine State Legislature without consultation with the Tribe.

Although the parties disputed the extent of the Tribe's reach in regard to the saltwater fishery, the notes reflect that the Tribe and the DMR were in agreement that saltwater issues were not addressed in the MICSA or the MIA. Yet, they came to opposing conclusions about how to apply that fact to the determination of Passamaquoddy saltwater fishing rights.

The notes summarize next steps: Governor Dore would put Maine Assistant Attorney General (AAG) Tom Harnett in touch with tribal attorneys at the Native American Rights Fund (NARF) in Colorado to discuss sustenance in aboriginal matters vs. commercial fishing with respect to licensing and the DMR would ask AAG Harnett to clarify the state's interpretation of the Settlement Acts and potential statutory changes in commercial fishing.

Increasing Tension 1994-1996

Between 1994 and 1996, tension surrounding this issue increased until, on October 25, 1996, Passamaquoddy Governor Dore issued an order to the Pleasant Point Passamaquoddy Police Chief, Joseph Barnes, directing him to "intervene in any actions by any and all person(s) or entity interfering with our people pursuing their Aboriginal Rights to harvest from our Territorial Seas with the strongest possible response."[3] (Addendum 4) This order resulted in a December 3, 1996 letter from the DMR's Director of Law Enforcement, Joseph E. Fessenden, advising Governor Dore that the "Marine Patrol would fully enforce all laws of Maine and that any obstruction of justice of a Marine Patrol officer in the course of his duties by any

[2] MITSC Notes taken by Diana Scully 11/21/94 (Addendum 3)
[3] Cliv Dore, Tribal Governor, Interoffice Memorandum to Joseph Barnes, Chief of Police, October 25, 1996.

individual, including Tribal Police officers, will be referred for criminal prosecution and for any appropriate civil action."[4] Fessenden went on to suggest a meeting on December 12, 1996 to discuss the October 25th "memo and underlying saltwater fishing issues."[5] (Addendum 5) The MITSC was unable to locate evidence of the suggested December meeting or any subsequent meetings between the Tribe and the DMR.

The 1997 "Task Force on Tribal-State Relations"

The January 15, 1997 final report of the Task Force on Tribal-State Relations, *At Loggerheads—the State of Maine and the Wabanaki*, identified seven areas of conflict including three that reflect the concerns in this inquiry: differing views on treaties and aboriginal rights, marine issues and sustenance fishing.[6] *At Loggerheads* also indicated that the MITSC minutes reflected that "Passamaquoddy concerns about marine issues" were discussed in seven meetings during five separate years.[7]

LD 273 "Resolve, Directing the Commissioner of Marine Resources to Negotiate with the Passamaquoddy Tribe Regarding Fishing Rights"

Pembroke Representative to the Maine State Legislature, Albion Goodwin, became concerned that the DMR was not negotiating with the Passamaquoddy Tribe. On January 21, 1997, he introduced LD 273 *A Resolve, Directing the Commissioner of Marine Resources to Negotiate with the Passamaquoddy Tribe Regarding Fishing Rights.* (Addendum 6) LD 273, introduced as emergency legislation, directed the Commissioner of Marine Resources to request meetings with Passamaquoddy leadership to discuss the Tribe's claims to fish in coastal waters and to work out an agreement.

The bill had its public hearing on January 30, 1997. Eleven people testified at the hearing. Ten testified in favor of the bill with Penn Estabrook, Deputy Commissioner of Marine Resources, testifying against the bill saying, "Because there is a good faith effort in negotiations underway, it is our sense that the proposal serves no purpose and may cloud the very process we are involved in."[8]

On February 6, 1997, John Kelly, legislative analyst from the Office of Policy and Legal Analysis (OPLA) for the Joint Standing Committee on Marine Resources, summarized the testimony on LD 273. (Addendum 7) He recorded the following among the comments of the proponents: coastal fishing rights were not discussed in the MICSA; Governor King had led the Tribe to believe there would be a meaningful agreement; the Tribe's traditional ability to harvest from the sea is questioned; the inherent right of the Passamaquoddy to harvest from the sea; lack of good faith on the part of state policymakers; the need for legislative oversight, the Tribe's

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[4] Letter from Joseph E. Fessenden to Pleasant Point Passamaquoddy Governor, Cliv Dore, December 3, 1976
[5] ibid
[6] The Joint Task Force on Tribal-State Relations, "At Loggerheads—the State of Maine and the Wabanaki," p 11-12.
[7] Ibid, p 16
[8] Testimony of E. Penn Estabrook Deputy Commissioner of Marine Resources, January 30, 1997

need to issue its own licenses that are as stringent or more stringent than the state's; the Passamaquoddy are a unique people; the negotiations have involved two separate cultures trying to talk with each other; the importance the Passamaquoddy give to the spoken word over the written word; and the lack of evidence that the Passamaquoddy signed away their fishing rights. Mr. Kelley recorded the following two points made by DMR in opposition to the bill: the DMR had negotiated in good faith and the DMR had dealt with the issues.

The Joint Standing Committee on Marine Resources amended LD 273 on February 12th to direct the Commissioner of Marine Resources to file a report on the status of their negotiations with the Passamaquoddy Tribe with the committee by May 1, 1997. On February 13th, LD 273 was voted out of committee as "Ought to Pass as Amended." Twelve Committee members voted in favor of the bill with Senator MacKinnon recorded as absent. LD 273, as amended, passed the House and the Senate and became effective on March 28, 1997.

Meeting the Requirements of LD 273 118th Legislature: The Department of Marine Resources Report

On April 24, 1997, Robin Alden, DMR Commissioner, summarized the outcomes of the discussions between the Passamaquoddy Tribe and the DMR in a letter (Addendum 8) to Passamaquoddy governors Cliv Dore of Pleasant Point and Richard Stevens of Indian Township. The letter outlined a DMR draft proposal, subject to legislative approval, to resolve the saltwater fishery conflict. DMR's proposed legislation was offered as a starting point for negotiations.

The DMR stipulated that all commercial fishermen, including members of the Passamaquoddy Tribe, had to be subject to the same conservation laws "concerning time, method and manner of harvesting the resource."[9] The proposal included provisions for a joint State of Maine and Tribal Council License: the Tribe could issue a license in addition to, but not as a replacement for, a State of Maine license. The Passamaquoddy licenses would be regulated as an internal tribal matter and could only be available to Passamaquoddy citizens, but a Passamaquoddy citizen could also get a license directly from the state. Even though the DMR acknowledged the Passamaquoddy authority to issue commercial fishing licenses along with the state, the DMR expected that only they would have license revocation authority. The DMR agreed to work with the Tribe to eliminate barriers for tribal fishers to meet commercial qualifications and to collaborate on a species by species review of the personal use provisions for marine resources already preserved in law.[10]

On May 2nd, Robin Alden, Commissioner for Marine Resources, filed a three-paragraph report with the Joint Standing Committee on Marine Resources. The report referenced the requirement to report on the status of negotiations with the Passamaquoddy Tribe in LD 273, and attached a copy of her April 24th letter to the Passamaquoddy governors (Addendum 9), and the DMR's proposed legislation.

[9] Letter from Robin Alden to the Passamaquoddy governors, April 24, 1997
[10] Ibid

Government-to-Government Negotiations

By June 1, 1997, thirteen Passamaquoddy who were participating in various saltwater fisheries under the Passamaquoddy Tribe's management were charged with a number of violations of state law. Negotiations between the Tribe and the State stalled again. At this point, the Tribe circulated proposed legislation to resolve the conflict and protect the Tribe's sustenance activities and their jurisdiction over commercial fishing enterprises. (Addendum 10)

Governor King moved to advance a resolution of the saltwater fishery conflict by meeting directly with both Passamaquoddy governors on October 2, 1997 in Bangor and then travelling to Pleasant Point on October 14, 1997 to meet with Passamaquoddy Governor Rick Doyle and the Pleasant Point Passamaquoddy Tribal Council, thus establishing direct government-to-government negotiations. In an October 21, 1997 letter to both Passamaquoddy chiefs, Governor King offered to name a team of senior officials to negotiate with the Tribe, and to pay for a mutually acceptable facilitator to advance the negotiations. (Addendum 11)

Gov. King went on to say that any arrangement must be, "Consistent with the fundamental framework of the MILCSA (sic)."[11] King agreed to have his staff review the Tribe's proposal and, in turn, he requested that they review the DMR proposal offered by Robin Alden in her April 24th letter. He suggested that these two proposals be the focus of their first meeting. Additionally, Gov. King made it very clear that he would not intervene in the prosecution of Passamaquoddy fishers and that the legislation would not address any violation of existing Maine state law. [12]

We could find no record of any negotiations resulting from Gov. King's intervention.

[11] October 21, 1997 Letter from Governor Angus King to both Passamaquoddy Governors: Rick Doyle (Pleasant Point) and Governor Richard Stevens (Indian Township)
[12] Ibid, p2

Section II: Defending Passamaquoddy Saltwater Rights in Court: State v. Beal

State v. Beal

The Passamaquoddy Tribe hired an attorney to defend the Passamaquoddy fishers charged in June of 1997 and the 13 cases were joined into one: *State v. Beal.* The defendants filed a motion to dismiss the case based on lack of subject matter jurisdiction[13] over Passamaquoddy Tribe fishers. They raised the federal protection of the Passamaquoddy Tribe's inherent authority, citing the US Senate Committee Reports from 1980 prior to the passage of the MICSA that characterized the jurisdictional provisions of the Settlement as:

> An innovative blend of customary state law respecting units of local government coupled with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self governing. *Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1979)* as quoted in S. Rep. *supra,* at 29 (emphasis added in the Passamaquoddy brief).

The Passamaquoddy brief (Addendum 12) further asserted that saltwater fishing was never addressed during the Settlement negotiations.

> By initiating these criminal cases, it is apparent that the State claims that Congress gave it the power to enforce state law against Passamaquoddy tribal members engaged in salt water fishing. The Defendants maintain that they have aboriginal or implied treaty fishing rights in the salt water, property rights which were not extinguished in the Settlement Act, and therefore remain federally protected . . . Although no express mention of salt water fishing appears in the Settlement Act, Defendants maintain that Congress clearly intended that matters vitally affecting the survival of tribal culture were to be an area of continuing tribal jurisdiction.[14]

This quote was footnoted explaining that jurisdiction on this issue was a political issue not addressed in the Settlement Act and, as such, required the application of the amendment provisions in 25 U.S.C. § 1725 (e)(1). This brief, dated December 13, 1997, included an attached copy of the Tribe's proposed legislation from October 1, 1997.

Judge John Romei, writing for the Fourth District Court of State of Maine, rejected the Passamaquoddy motion to dismiss the cases, finding that the State had jurisdiction over any violation of marine resources laws. (Addendum 13) His decision rested on two points of law: 30 M.R.S.A. § 6204 (Laws of the State to Apply to Indian Lands) and 30 M.R.S.A. § 6206.1 (Powers and Duties of the Indian Tribes Within their Respective Indian Territories (General Powers)). Links for all of the case law referenced in this section will be found in Appendix II.

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[13] Subject-matter jurisdiction is the requirement that the court have power to hear the specific kind of claim that is brought to that court.

[14] Memorandum in Support of Defendant's Motion to Dismiss *State of Maine v. Beal*

30 M.R.S.A. § 6204 in Deciding *State v. Beal*

Even though Judge Romei acknowledged that both the MIA and MICSA are "silent on the expressed issue of salt-water fishing rights,"[15] he accepted the state's argument that the MIA in 30 M.R.S.A. § 6204 subjects "all Indians and natural resources owned by them to the laws of Maine and to the civil and criminal jurisdiction of the courts except as provided in the Act."[16] Judge Romei concluded that legal precedent resulting from two earlier cases, *Passamaquoddy Tribe v. State of Maine* and *Penobscot Nation v. Stilphen*, bound him. In both of these cases, 30 M.R.S.A. § 6204 was cited to uphold the state's jurisdiction over the subject matter of each lawsuit. Therefore, Judge Romei relied on 30 M.R.S.A. § 6204 to terminate "any inherent salt-water fishing rights concerning non-reservation lands,"[17] and thus held Passamaquoddy fishers to state law.

Public and Legislative Discourse on 30 M.R.S.A. § 6204 in 1997

Exactly one year earlier, on January 15, 1997, the Task Force on Tribal-State Relations (Task Force) issued its report *At Loggerheads*. Among its "Findings and Analysis" the Task Force looked at "Assimilation and Sovereignty." In this section, it specifically looked at 30 M.R.S.A. § 6204 and heard testimony. Edward Bassett from the Passamaquoddy Tribe at Pleasant Point explained, "Section 6204 refers to the laws of the State applying to the Tribes. This is not self-determination . . . This is an erosion of sovereignty and should be amended."[18] Tom Harnett, AAG for the State of Maine, also found problems with the section, "People never want to talk about section 6204, but there must be an honest look at this, especially since this is a section the State relies on over and over again. This must be discussed, if one party does not agree with it."[19] At one point the Task Force even considered a proposal recommending the repeal of 30 M.R.S.A. § 6204.[20]

Additionally, MITSC minutes dated June 5, 1997 read (Addendum 14):

> Chair [Richard] Cohen[21] indicated that the major issue in 1980 was the land claims; very little else was addressed (other than section 6204); the Settlement was not intended to mean that salt water rights were not negotiable in the future; there was never any discussion about assimilating the culture; and MITSC was set up to deal with all of these issues. He noted that the state negotiators had all they could do to extinguish the land claims. He said MITSC could look at and recommend things that should not be subject to section 6204 and a big step forward would be to have actions by the state affecting the tribes come before MITSC.

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[15] *State v. Beal,* p 2
[16] Ibid, p 3.
[17] *State v. Beal* p 5-6.
[18] *At Loggerheads*, January 15, 1997, p 18
[19] Ibid, p 18
[20] ibid, p 18 "One recommendation proposed for consideration by the Task Force was the repeal of Section 6204."
[21] Richard Cohen was Attorney General for the State of Maine at the time of the Maine Indian Claims Settlement Negotiations, and through the crafting of the MIA and MICSA.

When the Task Force considered recommending the repeal of 30 M.R.S.A. § 6204, Evan Richert, the director of the Maine State Planning Office and a state representative on the 1997 Task Force on Tribal State Relations had this to say,

> Sovereignty stirs passion and fear on both sides. Before the State moves on this, it has to think through all of the implications. Sovereignty cuts across many ways and raises implications for others. For example, what are the implications for land and water outside the reservation and what are the implications for the Federal Government with respect to Maine? I am willing to think through these issues though. If it is assumed that there should be sovereignty, we need to know what this means. I'm not arguing whether sovereignty is good or bad. [22]

Ultimately, the Task Force did not recommend the repeal of 30 M.R.S.A. § 6204. In 1997, the Passamaquoddy Tribe introduced LD 956 "An Act to Repeal the Law Providing the State Laws Apply to Indian Lands." While LD 956 did not pass, LD 1269 (enacted in the First Special Session 1997) "Resolve, to Foster the Self-Governing Powers of Maine's Indian Tribes in a Manner Consistent with Protection of Rights and Resources of the General Public" did include a provision requiring the MITSC to "consider the concerns that gave rise to the legislation proposed by the Passamaquoddy Tribe to amend the Act to Implement the Maine Indian Claims Settlement and determine how those concerns may be addressed."[23]

30 M.R.S.A. § 6206.1: Internal Tribal Matters and *State v. Beal*

The Passamaquoddy defendants also argued that licensing Tribe members to engage in commercial saltwater fishing was an internal tribal matter. Again, Judge Romei ruled against the Tribe, utilizing the framework for determining an internal tribal matter that was laid out in *Akins v. Penobscot Nation* (November 17, 1997) in which the U. S. Court of Appeals, First Circuit found that the MIA, not federal Indian common law, must guide the determination of what was an internal tribal matter.

To further bolster his conclusion, Judge Romei referred to *Fellencer v. Penobscot Nation. Fellencer* was an employment case where the Maine Superior Court ruled that employment matters did not fall under the internal tribal matters provisions of the MIA. On January 19, 1999, *Fellencer* was reversed on appeal to the U.S. Court of Appeals, First Circuit, and the case was remanded for the entry of judgment in favor of the Penobscot Indian Nation.

30 M.R.S.A. § 6206.1: Recognition of Licensing as an Internal Tribal Matter in Negotiating a Solution to the Passamaquoddy Saltwater Fishery Conflict

The MITSC inquiry into the Passamaquoddy Saltwater Fishery Conflict documents how, from 1994 to 1997, both Governor King and the DMR recognized that the issuance of saltwater licenses was an internal tribal matter throughout their negotiations with the Passamaquoddy Tribe while maintaining the state's right to regulate as well. This concept was included in the 1997 proposed legislation offered by Robin Alden in her April 24, 1997 letter. While the MIA

[22] Ibid, p 18
[23] Resolve, c. 45 First Special Session—1997

is silent on the saltwater fishery, the regulation of sustenance fishing and hunting on reservation land had always been an internal tribal matter (30 M.R.S.A. § 6207(1)).

The 1980 State of Maine Legislative Record on the Maine Indian Land Claims and *State v. Beal*

In a footnote referencing the years of negotiations that resulted in a settlement to the Maine Indian Land Claims, Judge Romei quoted AG Richard Cohen's testimony before Maine's Joint Select Committee on the Land Claims (the Select Committee). The footnote refers to one of Cohen's answers to a set of questions posed by the Select Committee (Addendum 15) dated April 2, 1980, when he was Maine Attorney General. The Select Committee had asked Cohen to offer his opinion on a set of questions that had come up during the course of the development of the MIA. When asked "What is the effect of the settlement on State and Federal authority over coastal or marine resources?" Cohen had answered that the Pleasant Point Passamaquoddy Tribe could regulate shellfish gathering on mud flats that were adjacent to Passamaquoddy land, likening the Tribe's power to that of a municipality. Richard Cohen also opined, "The tribes will have no other rights in coastal or marine resources than any other person or entity . . . they have no more rights in the coastal lands or marine resources than any other person."[24] Judge Romei cited this answer as evidence the state had subject matter jurisdiction over the Tribe's rights in saltwater fisheries in the same way that the state would have jurisdiction over any municipality.

In answering the Select Committee's query, Richard Cohen focused specifically on the management of clam-flats in coastal lands adjacent to Pleasant Point and thus did not address the larger issue of the Passamaquoddy's reserved right to manage their saltwater fishery. We can find no evidence in the legislative record that the saltwater fishery issue was discussed at any other time during the Settlement Act negotiations.

Cohen's answers to the Select Committee's questions referred to above were included in the 1980 *"REPORT OF THE JOINT SELECT COMMITTEE ON INDIAN LAND CLAIMS RELATING TO LD 2037 'AN ACT to Provide for Implementation of the Settlement Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory.'"* The Select Committee was comprised of ten state representatives and three state senators.[25] This ad hoc committee was tasked with gathering information about the Maine Indian Claims Settlement, hearing and recording public testimony, and communicating its final report and recommendations to the state and federal governments; it was chaired by Senator Samuel W. Collins and Representative Bonnie Post.

In their report, the Select Committee offered their understandings about how the MIA would be implemented. This report, along with the committee's queries and Cohen's responses, were sent to the U.S. Senate, where they became part of the legislative record documenting the development of the MICSA. The report was also submitted to the Maine State Legislature and

[24] Memorandum dated April 2, 1980 from Attorney General Richard S. Cohen to [the Maine] Joint Select Committee on Indian Land Claims.

[25] Even though both Passamaquoddy and Penobscot Tribal Representatives were seated in the House, neither was appointed to the Select Committee.

the Maine Law and Legislative Reference Library. The Select Committee's report was among hundreds of documents reflecting both state and tribal positions that comprise the congressional record of the MICSA.

Fundamental conflicts regarding tribal fisheries are reflected in policy development and subsequent interpretations of the law. In a 1997 letter to the EPA (Addendum 16), Edward Cohen, Deputy Solicitor for the U.S. Department of the Interior, characterizes aboriginal fishing rights as reserved rights, rather than a grant of rights by the State of Maine, and articulates the federal position, when he states:

> According to the legislative history of MICSA, fishing rights are an example of natural resources considered "**expressly retained sovereign activities.**" H.R. Rep. No. 96-1353 at p 15(1980), reprinted in 1980 U.S.C.C.A.N. 7186 p 3791[26] (emphasis in the original)

Additionally, MITSC records dated March 5, 1997 (Addendum 17) indicate that when asked whether the Settlement negotiations encompassed saltwater rights, Richard Cohen, now the chair of the MITSC, issued the following clarification:

> It is my recollection that salt water rights and issues were not discussed during the settlement negotiations. These are legitimate issues for discussion now.[27]

[26] September 2, 1997 letter To: John DeVillars, Region 1 Administrator, Environmental Protection Agency, From: Edward Cohen, Deputy Solicitor, United States Department of the Interior, p 5. (Addendum 16)

[27] Fax from Diana Scully to Mike Best March 5, 1997 (Addendum 17)

Section III: Looking for a Legislative Solution

LD 2145, 118th Legislature: *An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe*

In early January 1998, while the Passamaquoddy Tribe was waiting for Judge Romei to rule on their motion to dismiss the criminal cases brought against tribal fishers in *State of Maine v. Beal*, Passamaquoddy Tribe Representative Fred Moore submitted the draft legislation produced by the Passamaquoddy Tribe after negotiations with the DMR and referenced in Governor King's October 21, 1997 letter to the Passamaquoddy chiefs as, *An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe.* The bill was co-sponsored by Representatives Goodwin of Pembroke, Jones of Bar Harbor and Perkins of Penobscot. (See Addendum 10) Representative Moore explained the purpose of the legislation: "The bill is calling for state recognition of tribal authority to issue its own licenses to its members . . . it is intended to be a compromise."[28] (Addendum 18) When he introduced the bill, he had strong support from the Passamaquoddy Tribe's leadership, as evidenced in the record of the public hearing on LD 2145 (Addendum 19) and the notes taken by OPLA analyst, John Kelly. (Addendum 20)

This proposed legislation, LD 2145, acknowledged the Passamaquoddy Tribe's jurisdiction over saltwater fishing and required the development of a Tribal-State compact. The provisions included the following terms:

1. The Passamaquoddy were authorized to take marine resources under the terms of a licensing compact to be negotiated between the state and the Passamaquoddy Tribe;
2. Until the compact was achieved, no state license would be required but Passamaquoddy fishers would adhere both to State of Maine conservation measures and an alternative regulation to be determined by the MITSC;[29]
3. Tribally issued licenses would be recognized for the taking, transport and sale of marine resources;
4. Any Tribe member with a Passamaquoddy tribal identification card could take marine resources for sustenance;
5. Any Tribe member authorized by Passamaquoddy government could take marine resources for ceremonial use;
6. Enforcement of the compact provisions on Passamaquoddy fishers fell, exclusively, to the Tribe;
7. Any resource gathered in violation of Passamaquoddy tribal code would be forfeited to the Tribe;
8. The law would be retroactive to June 1, 1997 (the date of the Passamaquoddy arrests).

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[28] Baldwin, Letitia, "Tribe seeks to issue own fishing licenses," The Bangor Daily News, January 9, 1998.

[29] The reference to the MITSC regulatory authority is unclear but seems to indicate that if compact negotiations stalled, the MITSC would develop interim operating regulations until negotiations were completed. This stop-gap measure would assure that Passamaquoddy fishers would be able to fish if compact negotiations extended into the lobster, elver and urchin seasons beginning in late March of 1998.

Bill Approved for Introduction with Added Tribal Approval Provisions

An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe LD 2145 (Addendum 21) was approved by the Reviser of Statutes for introduction pursuant to Joint Rule 203 (Cloture for Legislators at the Second Regular Session) and referred to the Committee on Marine Resources on January 20, 1998. The Reviser of Statutes determined that it was necessary to add a new section 3 that required Passamaquoddy Joint Tribal Council approval before the law could take effect and read:

> This Act does not take effect unless the Secretary of State receives written certification by the Joint Tribal Council of the Passamaquoddy Tribe that the tribe has agreed to the provisions of this Act, copies of which must be submitted by the Secretary of State to the Secretary of the Senate and the Clerk of the House.

The approval requirement in section 3 mirrored the process mandated by federal law (the MICSA) for all amendments to the MIA (25 U.S.C. § 1725 (e)(1)), which reads:

> (1) The consent of the United States is hereby given to the State of Maine to amend the Maine Implementing Act with respect to either the Passamaquoddy Tribe or the Penobscot Nation: *Provided,* That such amendment is made with the agreement of the affected tribe or nation, and that such amendment relates to (A) the enforcement or application of civil, criminal, or regulatory laws of the Passamaquoddy Tribe, the Penobscot Nation, and the State within their respective jurisdictions; (B) the allocation or determination of governmental responsibility of the State and the tribe or nation over specified subject matters or specified geographical areas, or both, including provisions for concurrent jurisdiction between the State and the tribe or nation; or (C) the allocation of jurisdiction between tribal courts and State courts.

This new section was an early acknowledgement that LD 2145 constituted an amendment to the MIA.

LD 2145 Public Hearing

On February 10, 1998, at the public hearing for LD 2145, 17 people testified on the bill. Only three testified in opposition. Laura Taylor read Penn Warren's (Acting Commissioner on Marine Resources) testimony on behalf of the DMR. Colonel Joe Fessenden (DMR) is also listed as testifying against LD 2145, although we find no record of his commentary. The OPLA records also include a letter from Norman Lemieux (a private citizen) of Cutler, ME. DMR opposed the legislation, alleging that the MIA extinguished saltwater fishing rights; that this issue had not been fully reviewed by the MITSC; and, finally, that they were concerned that the Tribe might not adhere to conservation regulations. Norman Lemieux objected to allowing tribal fishers to participate in the lobster and urchin industries. Four people testified in the "neither for nor against" category including Donna Loring, Penobscot Indian Nation Tribe Representative, and Greg Sample, the attorney of record for the Passamaquoddy defendants in *State v. Beal.*

At the public hearing, Passamaquoddy testimony was extensive. We include the following quotes as evidence of the importance the Tribe assigned to LD 2145. John Kelly, the legislative analyst from the OPLA assigned to the Joint Standing Committee on Marine Resources, noted (Addendum 20):

> You limit my access to food and limit my freedom. [This is][30] a survival issue for us. [I] want food on the table of every Passamaquoddy, there are only 3,000 of us now. *(Governor John Stevens of Indian Township Passamaquoddy)*
>
> [The Settlement Act is] a subtle and legal form of genocide. I was part of the negotiation committee of the Settlement Act. We presumed to take saltwater rights for granted. It didn't come up . . . This bill is an attempt to resolve a political conflict. (*Wayne Newell, Indian Township Passamaquoddy member of the Maine Indian Claims Settlement negotiation team)*
>
> [This] bill is important to the entire tribe. [There is] much more to the bill than taking fish—[the] message [is]: recognize difference and respect that difference. We are an endangered species—[I am] fearful who [will] speak the language. [The amended] 16-b[31] (sic) in [the] claims act: Any future federal legislation for the benefit of Indians will not apply in Maine. [The] harvest of seafood is critical to [the] existence of [the] tribe. Just like an eagle hunts to kill, [it is] a duty. *(Pleasant Point Passamaquoddy Lieutenant Governor, William Altvater)*

The Work Sessions: Delimiting Tribal Authority and Redefining Sustenance

In its summary provided to the Joint Standing Committee on Marine Resources (Addendum 22), the OPLA questioned whether conservation regulations would apply to sustenance fishing and fishing for ceremonial purposes, and drew attention to amended language in the proposed bill that limited "sustenance" to the activities of taking, possessing, transporting and selling, and distributing. It is important to note that "taking, possessing, transporting and selling, and distributing" were now in both sustenance and commercial fishing definitions. Defining sustenance and commercial fishing through a common set of activities would cause confusion in 2014, when the DMR submitted a bill that criminalized all of these activities if the tribe fisher did not hold a tribal license that was authorized by the DMR, thereby, inadvertently, criminalizing sustenance saltwater fishing.

Sustenance is not defined by activity in either the MICSA or the MIA. Even though the word is used in the MIA (30 M.R.S.A. 6207), there is no language limiting sustenance to a set of activities. The Report of the Joint Select Committee on Indian Land Claims distinguishes sustenance as hunting or fishing for personal consumption or use:

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[30] Brackets are author inserted.

[31] Most likely a reference to 25 U.S.C. § 1735 (b) Application of Federal law for the benefit of Indians, Indian nations or tribes or bands of Indians"

> The provisions relating to Indian sustenance hunting and fishing apply only to hunting or fishing for personal or family consumption. They do not apply to hunting or fishing to maintain a livelihood or other commercial purpose.[32] (Addendum 23)

The limitation of sustenance to certain activities is important because sustenance is specifically protected in the MIA, 30 M.R.S.A. § 6207 (1)(4)(6) where it is stipulated that sustenance fishing is subject only to tribal ordinance. The MIA does delineate a process to address any adverse effect on a species as a result of tribal sustenance hunting or fishing ordinances. The burden of proof in this process rested entirely with the state. The process is outlined in 30 M.R.S.A. § 6207(6), and closes with the following paragraph,

> In any administrative proceeding [alleging tribal sustenance fishing regulations are inadequate or require state administrative action] under this section the burden of proof shall be on the commissioner.[33] The decision of the commissioner may be appealed in the manner provided by the laws of the State for judicial review of administrative action and shall be sustained only if supported by substantial evidence.

To date, the state has never exercised this provision. Specifying tribal sustenance activities in state statute was, and is, a significant amendment to the MIA.

The Joint Standing Committee on the Judiciary Determines That LD 2145 Amends the MIA

On February 25, 1998, the Chairs of the Joint Standing Committee on the Judiciary issued a memo entitled "Amendments to the Act to Implement the Maine Indian Land Claims Settlement" (Addendum 24). This memo addressed LD 2145 stating, "We have determined that if the effective date of legislation is contingent on ratification by the Passamaquoddy Tribe, the Penobscot Nation or both, that legislation is, in effect, an amendment to the Implementing Act and should therefore amend Title 30."

Work Session of the Marine Resources Subcommittee on LD 2145: The Creation of 12 M.R.S.A. § 6302-A[34] (Amendment A)

At the March 3, 1998 work session, the Marine Resources subcommittee on LD 2145 released extensive revisions to the proposed law: (Addendum 25)

1. The compacting requirement was removed and, in its place, specific and significant limitations were placed on Passamaquoddy fishers' participation in the lobster, crab and urchin fisheries;
2. The definition of sustenance heretofore recognized as an internal tribal matter and left to the Passamaquoddy Tribe to determine, was now limited by the state to the

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[32] Report of the Joint Select Committee on Indian Land Claims, 4/2/80, signed by Senator Samuel Collins and Representative Bonnie Post

[33] In this case, the statute refers to the Commissioner of Inland Fisheries and Wildlife.

[34] LD 2145 amended 12 M.R.S.A. § 6302 by adding a Subsection "A" titled "Taking of marine organisms by Passamaquoddy tribal members. LD 2145 was often referred to simply as "Amendment A" in the notes and records of public debate.

activities of taking, possessing, transporting and distributing. This left out two components of sustenance: barter and exchange, thus impacting the Tribe's ability to participate in the commercial fishery;
3. State conservation regulations were to apply to Passamaquoddy sustenance fishing;
4. Sustenance, heretofore defined in Passamaquoddy Tribal statute, as provided for by the MIA, (30 M.R.S.A. § 6207(1)) ***would now be defined instead in Maine state law 12 M.R.S.A. § 6302-A*** that governs the taking of marine resources;
5. Enforcement of the laws governing the taking of marine resources was assigned entirely to the state, thus eclipsing tribal authority to enforce its own regulations;
6. Sec. 3, the MICSA language requiring approval of the Passamaquoddy Joint Tribal Council for the enactment of changes to the MIA, was removed from this draft;
7. A new section directing MITSC to study any ongoing questions was added;
8. The section requiring the Passamaquoddy Tribe approval of LD 2145 prior to enactment[35] was removed with this revision.

OPLA Memo on Amendment A: LD 2145 is an Amendment to the MIA.

On March 9, 1998, John Kelly, Legislative Analyst for the Joint Standing Committee on Marine Resources, sent a memo to the members of their LD 2145 Subcommittee (Addendum 26) in which he writes, "Jon Clark (OPLA's attorney) reviewed the subcommittee's proposed amendment, as well as the federal and state land claims act laws, and concluded that the amendment would require ratification of both the state and the tribe."

Addition of the "Blow-up" Clause to LD 2145

By March 10, John Kelly's notes reflect that the OAG had recommended a "Blow-up Clause." (Addendum 27) In legal terms this is a severability clause that means one defect in a contract or law "blows up" or destroys the whole or a part of any contract or law.[36] The blow-up clause replaced the MIA language requiring the Passamaquoddy Tribe's approval of any amendments to the Settlement Act in Sec. 3 and read:

> This Act is not an amendment to the Maine Revised Statutes, Title 30 chapter 601, An Act to Implement the Maine Indian Claims Settlement, and is not subject to ratification by the Passamaquoddy Tribe pursuant to United States Code, Title 25, Section 1725 (e)(1). If a court of competent jurisdiction finds that this Act or any portion of Title 30, chapter 601[37] so as to constitute an amendment to Title 30, chapter 601, this Act or that portion of this Act, if separable, that constitutes an amendment to Title 30, chapter 601 is void.

In other words, if LD 2145 were found by a "competent court of law" to be an amendment to the MIA the portion of the law affected or the whole law would be void. In this case, the "blow-

[35] Since this law only affected the Passamaquoddy Tribe, only the Passamaquoddy Tribe's approval was needed.
[36] Michael Dorf, Robert S. Stevens Professor of Law, Cornell University, *The Puzzling Insistence on a Non-Severability Clause,* June 27, 2011
[37] Maine Implementing Act (MIA), M.R.S.A. Title 30, Chapter 601.

up" clause allowed the legislature to work around the statutorily mandated requirement for Passamaquoddy Joint Tribal Council approval for changes to the MIA, and to proceed with LD 2145 against the recommendations of OPLA and the Joint Standing Committee on the Judiciary. It also meant that the Passamaquoddy Tribe would have no authority to reject subsequent amendments to the law other than to bring legal suit.

OPLA Reviews the "Blow-up" Clause

On March 12, 1998, a memo (Addendum 28) authored by John Kelly was sent to Greg Sample, Attorney for the Passamaquoddy Tribe, and Paul Stern, AAG for the State of Maine. Despite the March 9th advice that LD 2145 was an amendment to the MIA, OPLA now indicated that the addition of the "blow-up" clause had the following effect, "Any claim that the Act requires ratification or that it is an amendment to the Claims Settlement Act would be finally settled in a court."

With the inclusion of the "blow-up" clause, the Passamaquoddy Tribe's capacity to approve or reject amendments to the MIA, as mandated in the MICSA, was nullified. Their only recourse would be to prove in a "court of competent jurisdiction" that LD 2145 improperly amended the MIA. In other words, the "blow-up" clause allowed the State of Maine to unilaterally define the tribal-state relationship with regard to the Passamaquoddy saltwater fishery. The tribe could only overturn these provisions through further litigation.

The Legislative Record on LD 2145

On March 23, 1998, as Amendment A to LD 2145 was debated in the House, Representative David Etnier, chair of the Joint Standing Committee on Marine Resources, offered the minority report of the committee, explaining that LD 2145 was an amendment to the MIA and should be treated as such (Addendum 29). He states:

> There is also one of my favorite parts of the Committee Amendment as what is known to the Attorney General's Office as the blow-up clause. It is an attempt to get around the fact that this is an amendment to the settlement act. The Attorney General's Office of the state told us it was an amendment to the settlement act. Our OPLA staff told us it was an amendment to the settlement act and yet the Majority Report, the Committee Amendment refuses to acknowledge that . . . it is one of the most peculiar means of addressing or not addressing the sustenance issue I have ever seen.

Later, Rep. Richard Thompson, chair of the Joint Standing Committee on the Judiciary, echoed Rep. Etnier's statements:

> The problem I have with this bill is not only that it has not gone through what I consider the proper process, but that it is clearly an attempt to whatever you want to call it, amend the act, clarify the act or whatever. It is related to the act. I feel very strongly that if changes are going to be made on [an] issue pertaining to the act, then they should be made in the way prescribed by the act. That if it is going to be something passed by this Legislature then it should be designated as a change to the act and should be subject to ratification by the tribes . . . ***The tribe does not have to ratify this bill. Therefore, there is a strong argument that they are not subject to***

> ***this bill and that if they have inherited sovereignty rights, they can go on pursuing them.*** (Emphasis added.)[38]

On March 24, 1998, the debate moved to the Senate. A similar discussion ensued regarding the blow-up clause. Senator Benoit explained his concerns:

> Pretty self serving, it seems, to say well, the reason this is general law is because the Compact is a cumbersome process. It's a cumbersome process for a very good reason. You do not change the laws relating to the Tribe and the Nation lightly, such as intended here, by this end run play in the general law [. . .] I'm disappointed that there's no written formal Opinion of the Attorney General that I've had the opportunity to read, that indicates that this is a valid way to go about this business. (Addendum 30)

Over these objections, the law was passed in the House on March 23rd and in the Senate on March 25th. On April 3, 1998, LD 2145 was signed into law.

Thus the stage was set to further codify amendments to MIA in 12 M.R.S.A. § 6302-A, rather than through the process required by both state and federal law in which both the tribes and the state would formally approve any changes to MIA.

After LD 2145 was passed, Jon Clark, legal counsel for the OPLA would write,

> The amended version that came out of committee was hotly debated; some believed strongly that it was not legally possible to enact this law without amending the Maine Land Claims Settlement Act. The law directly confronts this issue in Sec. 3. It appears that this law, if it is not struck down, may well mark a new direction in tribal/state relations.[39] (Addendum 31)

Office of the Attorney General's Responsibilities to Inform Legislative Matters

The OAG consistently plays an important role both in defining the tribal-state relationship and in the development of law and policy that affect the negotiated agreement that is reflected in the Settlement Acts. The OAG has the responsibility to protect the interests of the state and its collective citizenry. In order to accomplish this task, the OAG provides their advice on matters of law. This is a statutory responsibility of the OAG found in M.R.S.A. Title 5, chapter 9 § 195:

> The Attorney General shall give his written opinion on questions of Law submitted to him by the Governor, by the head of any state department or any of the state agencies or by either branch of the Legislature or any member of the Legislature on legislative matters.

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[38] This quote references "tribes" when discussing the amendment provisions of the MIA and refers to "tribe" in referring to how Passamaquoddy ratification is not required in Amendment A.

[39] Memo from Jon Clark to Susan Johnson NCSL (National Congress of State Legislators), June 5, 1998 in the remarks section on the fax cover sheet.

When the OAG provides a written opinion in writing, all parties benefit from a deeper discussion of the crucial legal issues at play and a more informed conversation about the issues can take place. In the review of available public material, the MITSC could not find a written opinion from the OAG regarding the saltwater fisheries conflict. The notes and memos of John Kelly, the legislative analyst assigned to the Joint Standing Committee on Marine Resources, indicate that significant questions were posed by the Joint Standing Committee on Marine Resources regarding the impact of the LD 2145 on the MIA, and that AAG Paul Stern participated in the LD 2145 workgroup.

A written explanation of the OAG's concerns about LD 2145 and the basis for recommending the blow-up clause might illuminate the reasons for moving away from negotiated agreements and towards litigation to resolve conflicts. Since the Settlement Acts both reflected negotiated agreements among the tribes, state and federal government, and resulted from the settlement of a lawsuit, it is crucial that policy decisions that affect this settlement are developed in a fully transparent and careful way.

Given that opinions on the MICSA and/or the MIA affect five sovereign governments and involve federal statutory adherence and given that tribe citizens are also state citizens, it would be important that M.R.S.A. Title 5 Chapter 9 include provisions that both advance public understanding and increase transparency.

Section IV: State Legislation to Further Limit the Passamaquoddy Saltwater Fishery—LD 451, LD 1625, and 1723 in the 126th

Amending 12 M.R.S.A. § 6302-A

We include here a brief narrative of subsequent amendments to 12 M.R.S.A. § 6302-A which constitute further erosion of the required amendment process outlined in the MICSA 25 U.S.C. § 1725 (e)(1) regarding Passamaquoddy authority to approve or reject any changes in the Tribe's jurisdictional relationship to the state.

In 2013 and again in 2014, the Maine State Legislature amended 12 M.R.S.A. § 6302-A (LD 2145), thus unilaterally amending the MIA in direct contravention to the provisions of MICSA. We can find no evidence in the legislative record that the OAG offered the legislative history of LD 2145 and the controversy surrounding that law as the legislature considered new amendments.

This illustrates the importance of institutional memory. When the legislature considers legislation that will affect the federally recognized tribes, it is vitally important that the committee that is reviewing the legislation have a thorough grasp of the statute's legislative history. The state entities most suited to prepare the legislative bodies are the OAG, the OPLA and the MITSC. In this case, the legislative history of LD 2145 would have been important information for the Joint Standing Committee on Marine Resources to review as they shaped the law.

MITSC Concerns

The MITSC has a unique responsibility to review the effectiveness of the negotiated agreements between the tribes and the state as reflected in the Settlement Acts and to make recommendations to the tribes and to the state. In order to carry out this charge, the MITSC must have the resources and the opportunity to review legislation that impacts these Acts in any way. In 1998, the legislative record explains why MITSC did not act on LD 2145. In the words of Rep. Etnier:

> In the act was a very important additional piece of information [that] was the creation of the Maine Union Tribal State Commission [sic]. This was meant to be the means for addressing all future disputes between the state and the tribe. It has equal representation . . . That is where this bill should have gone. It did not go there. Let me make that very clear. It did not go there. We received nothing from MITSC regarding this bill and its enormous magnitude. Why? It was not brought before them. I think that is important to also understand. The legitimate means for addressing these legitimate grievances, concerns of the Passamaquoddy Tribe were not brought before the Joint Indian Tribal State Commission as they should have been.[40]

In 2013 and 2014, although the subsequent amendments to 12 M.R.S.A. § 6302-A: LD 451, LD 1625 and LD 1723 were not referred to the MITSC for review, the MITSC became aware of the

[40] Maine Legislative Record—HOUSE March 23, 1998 Rep. Etnier speaking (see Addendum 29)

legislation and did raise the issue that that these pieces of legislation significantly affect the jurisdictional underpinnings of the MIA.

LD 451: Limiting Passamaquoddy Participation in the Elver Fishing Industry

LD 451: *An Act Relating to Certain Marine Resources Licenses* initially focused on limiting the participation of Passamaquoddy fishers in the state's lucrative elver fishing industry. It was later amended to expand both the state's own fishery by 25 licenses and allow for the participation of fishers from the Penobscot Indian Nation, the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs. LD 451 limited Passamaquoddy participation, heretofore unlimited, to 200 commercial elver licenses. The Passamaquoddy Tribe objected to this restriction, arguing that their management plan, which limited the Tribe's overall catch rather than the number of individual fishers, was a more efficient conservation method than the state's plan which limited the number of individuals entering the fishery and the quantity of gear permitted to each fisher without limiting the catch.

In 2013 the MITSC, acting on its statutory responsibility, raised its concern that LD 451 further constricted the saltwater fishing rights of the Passamaquoddy Tribe and constituted an amendment to the MIA, which would, therefore, require Tribal Council approval. At the request of Patrick Keliher, Commissioner of Marine Resources, Attorney General Janet Mills responded with a letter *re: Regulation of Salt Water fishery Under the Maine Indian Claims Settlement Act*. (Addendum 32) The 1998 concerns of the OAG, OPLA and the Joint Standing Committee on the Judiciary that amending the negotiated settlement acts would require tribal approval, and the late addition of Amendment A, Section 3 (the blow-up clause) were never referenced in this letter. Instead, AG Mills writes, "[LD 2145] was enacted like any other statute and may be amended or repealed or kept on the books like any other legislation in accordance with the will of the Legislature."

The 2013 Elver Fishing Season

In 2013, the legislature enacted amendments to 12 M.R.S.A. § 6302-A as codified in LD 451 that essentially bypassed the legislatively mandated tribal approval process and substantially undermined the Passamaquoddy Tribe's jurisdiction over their saltwater fishery. The Tribe acted on their reserved rights to the saltwater fishery and fished under Passamaquoddy conservation guidelines that were more stringent than those of the state in that they limited the catch and the type of gear used in order to have minimal impact on the American eel. These limitations reflected their culture and ties to land, waters and species. Sixty-eight Passamaquoddy were cited for fishing without a license in 2013. All of these cases were dismissed or filed without further action.

LD 1625 AND 1723: Further Erosion of the MIA Amendment Provisions

In January and February of 2014, as the 126th legislative session came to a close, the DMR and the Passamaquoddy Tribe came to consensus on management mechanisms that would allow co-management of the fragile elver fishery. These mechanisms were codified in Passamaquoddy Tribal law. The Tribe had put in place an aggressive conservation plan that would have a negligible impact on non-Native elver fishing. The structure of this agreement was presented to the Atlantic States Marine Fisheries Committee (ASMFC) on February 6,

2014 in order to secure federal approval for the State of Maine to fish elvers in 2014. The ASMFC approved the state's plan because it included the successful negotiation of an agreement with the Passamaquoddy Tribe. The Tribe submitted a proposed Memorandum of Agreement to co-manage the elver fishery to the DMR that included the consensus management mechanisms that had been negotiated.

Passage of LD 1625

On February 12, 2014, in the week following these presentations to ASMFC, at a legislative work session on LD 1625, Commissioner Patrick Keliher announced that the AG had "equal protection" problems with the negotiated agreement. The DMR immediately withdrew support for the provisions it had negotiated with the Tribe. When asked to explain the "equal protection" issues raised by the OAG, a representative of the OAG explained that "all groups must be treated the same."[41] Even though the OAG was asked by DMR to give an opinion on the Tribe's proposed Memorandum of Agreement,[42] we find no evidence that a written OAG opinion was ever produced. Instead, AAGs were present at each public work session to answer questions and AAG Jerry Reid met with Passamaquoddy Tribal leaders and their attorney to discuss the OAG's equal protection concerns at the request of the MITSC chair.

The written legal opinion of the Passamaquoddy Tribe that was provided to the legislative work session is included in this report. (Addenda 33, 34) A written explanation of the OAG's concerns might have dispelled confusion and yielded a more constructive conversation about the equal protection issue identified by the OAG. Fully understanding any concerns that the tribes, OAG, the administration or the legislature have relative to laws, regulation or policy that may affect the Settlement Acts is a fundamental first step to resolving conflict.

Over objections by the Passamaquoddy Tribe, the state passed two pieces of legislation: LD 1625, which requires the Tribe to manage its fishery according to state regulations, and LD 1723, which outlined new compliance requirements, enforcement provisions and penalties in various commercial fisheries.

LD 1723 was enacted on March 13th, and LD 1625 on March 18th, four days in advance of the scheduled start of the elver season. This put the Passamaquoddy tribal law, which reflected the earlier, negotiated agreement, in direct opposition to the state's new law, thus creating a crisis for the Tribe's fishery. The Passamaquoddy Joint Tribal Council met over four days of public meetings within the Tribe to avert a crisis. In the end, the Tribe amended Tribal law to assign individual quotas and added the following language to all Passamaquoddy licenses (Addendum 35):

> This license is issued pursuant to the inherent rights of the Passamaquoddy Tribe as secured under various treaties and federal law, and as implemented through the Tribe's Fisheries Management Plan Governing Salt Water Hunting, Fishing and Gathering.

[41] Public Work Session, February 19, 2014
[42] Patrick Keliher public testimony, February 12, 2014

Section V: Impact of Racism on Tribal-State Relations

The 1997 Report of the Task Force on Tribal-State Relations listed racism among its "Findings and Analysis."[43] "Racism is experienced by the Wabanaki, but generally is not recognized by the majority society. Racism is part of the context of tribal-state relations."[44] Later in the same report, the Task Force "urge[d] the MITSC not to skirt the issue of racism in its deliberations."[45]

In 2000, the MITSC minutes (Addendum 36) reflected a discussion of racism by commissioners calling for a "real examination of racism, noting that it is easy to talk about racism when it is far away, but it is hard to talk about it here" and that it may not be possible to separate racism from sovereignty. [46]

Throughout 2013 and 2014, the MITSC received reports of unacceptable and disrespectful language in public hearings and work sessions on the saltwater fisheries conflict. Over the course of the legislative hearings, five MITSC commissioners, the executive director, and the chair reported several incidents in which prejudice was expressed in a public forum. After a particularly charged public work session on February 19, 2014, the MITSC discussed the need to address racism, unacceptable language, the disrespect of Wabanaki leaders, and the impact these factors have on tribal-state relations. (Addendum 37) The MITSC contacted legislative leadership in the House and Senate in an effort to address these concerns.

A significant lack of knowledge about the governmental status of federally recognized tribes as sovereign nations and confusion about the State of Maine's responsibilities in implementing the negotiated agreement reflected in the Settlement Acts persists. A statutory framework governs the relationship and outlines responsibilities among the parties to this agreement. Understanding the nature of this relationship and these responsibilities is fundamentally important in order to address negative prejudicial attitudes and the prevailing public opinion that the tribes are seeking "special treatment" rather than seeking the respect due them as sovereign nations. In this case, racism occurs when national and state governing bodies and citizens do not consider these distinct rights as legitimate because they do not exist for other racial groups.

While the issue of racism and its impact on tribal-state relations is central to resolving long-standing conflicts, it is too complex to address in this report and requires a separate and complete inquiry. A deeper understanding of the Settlement Acts, the issues that the tribes confront, and the importance of treating each other with respect and dignity will increase the prospects for resolving long standing issues between the tribes and the state.

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[43] At Loggerheads, p iv, p35-36
[44] Ibid, p 35
[45] Ibid, p 36
[46] MITSC Minutes, 6/12/2000

Section VI: Identifying Solutions

By examining these issues we have sought to deepen understanding of a particular conflict arising from the differing interpretations of the MIA and MICSA held by the tribes and the state. Years of negotiations to resolve the saltwater fisheries conflict played out against a backdrop where the state continued to assert criminal or civil jurisdiction over the Passamaquoddy Tribe and individual Tribe members. In order for the Tribe to protect its inherent rights, they are often forced to argue their interests in state court where a body of case law has now been established that significantly narrows the interpretation of both the MICSA and MIA as it is reflected in the legislative and congressional record and in the documented understandings of negotiators on the state side as well as the tribal side.

The state court decisions have failed to uphold both the articles of construction in the MICSA and in Federal Indian Common Law; thus, the federally recognized tribes in Maine must rely on federal courts to uphold these provisions. The adversarial process of resolving conflicts in court that involve the negotiated settlement reflected in the MIA and MICSA mitigates productive tribal-state relations. The implementation of the MIA has been determined by court decisions rather than through good faith negotiation among the parties as was intended.

We undertook this examination to shed light on the saltwater fisheries conflict and to advance constructive dialogue and mutually beneficial solutions. Our findings are offered both as a summary of what we have learned and as a catalyst for the development of constructive solutions. In our recommendations, we offer a way to proactively and pragmatically address issues that were not resolved in the 1980 negotiations that settled the Passamaquoddy and Penobscot land claims and resulted in the MIA and the MICSA. This is why the MITSC was created: to bring focused effort to recommendations that have the potential to resolve the issues that result in conflict between the tribes and the state. It is our goal not only to provide a pathway to conflict resolution, but also to ground this process in mutual understanding and genuine partnership.

Before the public release of this report, the MITSC made efforts to meet with all of the parties to the saltwater fishery conflict. In these meetings, we were reminded of numerous attempts to reach mutually beneficial agreements and build productive working relationships between the tribes and the state.

We conclude that open dialogue, negotiations, and formal agreements are mechanisms that are both pragmatic and constructive. We offer this report with sincere hope for a renewed commitment to advance conflict resolution among all of the peoples who live within the State of Maine.

Section VII: Findings

1. The intergovernmental saltwater fishery conflict between the Passamaquoddy Tribe and the State of Maine arises from cultural distinctions and opposing interpretations of how the federal Maine Indian Claims Settlement Act of 1980 (MICSA) and the Maine Implementing Act (MIA) impact the Passamaquoddy fishery.
2. The Passamaquoddy Tribe stands on its retained aboriginal rights to fish within its traditional territory, which extends beyond the reservation boundaries, without interference from the state. They contend that these rights have never been extinguished.
3. The State of Maine through the OAG counters that the MIA Sec. 6204 "LAWS OF THE STATE APPLY TO INDIAN LANDS" means that the tribes have no rights except as specified in the MIA. This position is amply supported in case law and the OAG has advised that the Passamaquoddy Tribe retains no rights to the saltwater fishery, and that the State of Maine has the sole authority to regulate that fishery and to prosecute Passamaquoddy fishers who fish according to Passamaquoddy tribal law rather than State law.
4. The articles of construction specified in the federal MICSA (25 U.S.C. § 1735 (a)) provide that "In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this Act shall govern." The provisions of the federal MICSA thus override the MIA provisions when there is a conflict between the two.
5. MICSA (25 U.S.C. § 1725 (e)(1)) provides that tribal approval is required for any amendments to the MIA that relate to "the enforcement or application of civil, criminal or regulatory laws of the Passamaquoddy Tribe, the Penobscot Nation and the State within their respective jurisdictions" or the allocation of responsibility or jurisdiction over governmental matters between the tribes and the state.
6. Although the MIA was passed first chronologically, the U.S. Constitution and federal Indian law give Congress control over Indian Affairs, making the MIA subordinate to the MICSA, and the federal Act requires the approval of affected tribes to amend the MIA. Thus, the MIA is subordinate to the MICSA.
7. The escalating conflict between the Passamaquoddy Tribe and the State of Maine about the reach and jurisdiction of the Passamaquoddy saltwater fishery described in this report illustrates that:
    a. When saltwater fishery issues have arisen—in the late 90's, and, to some extent, over the last year—the governor of the state and/or the Commissioner of Marine Resources have made concerted efforts to cooperate, negotiate in good faith and develop mutually acceptable agreements.
    b. Through these negotiations, prospects for employing conservation-based measures to ensure a sustainable fishery have emerged, and promising

strategies for cooperation and co-management of the fishery through a formal Tribal-State agreement have been developed.

c. LD 2145 constitutes an amendment to the Maine Implementing Act. In 1998, both OPLA and the OAG provided legal opinions to the Joint Standing Committee on Marine Resources that LD 2145 constituted an amendment to the MIA.
d. By passing LD 2145 the state unilaterally codified contested jurisdictional issues without the approval of the affected tribe and it arbitrarily changed the sustenance definition specified in 30 M.R.S.A. § 6207 (1) (4) (6).

8. LD 2145's blow-up clause, designed by the OAG, created a legislative pathway to avoid the statutory requirements of the MICSA requiring tribal approval of amendments to the negotiated agreements codified in the Maine Indian Claims Settlement Acts.
9. The implementation of LD 2145's blow-up clause leaves the Passamaquoddy Tribe with no recourse but to prove in a "court of competent jurisdiction" that LD 2145 improperly amended the MIA. Defending against persistent attempts to diminish legitimate tribal authority through the state's legislative process produces an undue burden on limited tribal resources.
10. In 1998, 2013 and 2014, the state legislature voted to approve legislation that violates both the spirit and the law of both MICSA and MIA.
11. The OAG is responsible for protecting the state's interest and the interests of <u>all</u> of its citizens and the legal analysis of the OAG is an essential perspective for the development of state policy that affects tribal-state relations.
12. M.R.S.A. Title 5, Chapter 9 provides no clearly articulated set of provisions regarding the OAG's responsibility to provide guidance to state government on the application of the MIA and the MICSA. These provisions already exist in the areas of hate crimes and domestic violence.
13. In order to promote good problem solving and advance solutions to tribal-state conflict, it is important that the OAG be part of seeking a solution. Legal opinions offered in writing would better inform discussions and possibly yield a durable result that meets the needs of the tribes and the state.
14. After a hopeful beginning, the extensive legislative, judicial, and executive branch processes employed to resolve the intergovernmental saltwater fisheries conflict, as documented in this report, became costly, ineffective and adversarial. The tribal-state relationship was negatively affected as opportunities for cooperation and the potential for mutually beneficial solutions eroded.
15. Although the MITSC has completed a thorough review of extensive primary material, there remains much to study. The ongoing process of reviewing the negotiated agreements as they are reflected in the Settlement Acts, the Congressional Records and the state records and tribal records and assessing ensuing laws and public policy that affect the federally recognized tribes in Maine is within the scope of the MITSC.
16. The state has a statutory responsibility (30 M.R.S.A. § 6212 (5)) to provide data to MITSC to carry out its task.
17. The MITSC has identified a need to address racism and the impact it has on tribal-state relations.
18. A significant lack of knowledge about the governmental status of federally recognized tribes as sovereign nations and confusion about the nature of the State of Maine's

responsibilities in implementing the negotiated agreement reflected in the Settlement Acts affects the quality of tribal-state relations.

19. A deeper understanding of the Settlement Acts, the issues that the tribes confront, and the importance of treating each other with respect and dignity will increase the possibility of resolving longstanding issues between the tribes and the state.
20. The ongoing review of the Settlement Acts and the mechanisms of implementation will better inform legislators, courts and the general public while advancing a climate of problem solving and creating an environment in which mutually beneficial solutions can be developed and implemented.

Section VIII: Recommendations

1. The MITSC must be sufficiently resourced to carry out its role of advancing recommendations that have the potential to resolve conflicts and result in mutually beneficial solutions between the tribes and the state. (Findings 6 and 19)
2. The articles of construction in the Maine Indian Claims Settlement Act outlined in 25 U.S.C.S § 1735 (a) must be applied by all parties: federal, state and tribal. (Finding 4)
3. The statutory process to amend MIA, as specified in MICSA 25 U.S.C. § 1725 (e)(1), must be conscientiously followed by all parties. (Findings 5 and 10)
4. A tribal-federal-state summit should be held on marine resource co-management. (Findings 2, 3 and 7 a and b)
5. Where the tribal-state jurisdictional relationship remains contested, the state and the tribes should commit to good faith negotiations at the highest level in order to execute Memoranda of Understanding (MOU) using model MOU that have proven to be effective in other states. (Findings 1, 2, 3 and 7)
6. The tribes and the Maine State Legislature should use formal MOUs that specifically recognize and reaffirm the equal standing of each of the parties to enter into agreements for mutually beneficial purposes. (Findings 1, 2, 3 and 7)
7. A MOU between the tribes and the state should be developed to address unresolved issues regarding the saltwater fishery conflict and it should replace 12 M.R.S.A. § 6302-A. (Findings 1, 2, 3 and 7)
8. The OAG, the tribes, and the MITSC should routinely review proposed legislation that affects the MIA or the MICSA for adherence to the negotiated settlement reflected in the MIA and MICSA. (Finding 8 and 9)
9. All reviewing entities should make their findings available in writing to the relevant legislative committee in a timely fashion so that these reports can inform the legislative process. (Finding 8, 9, 12 and 14)
10. In order to advance mutually beneficial solutions and build trust, provisions for the OAG to provide advice and counsel to the legislature and the administration, to provide formal, well-reasoned, written responses to legislative and administrative requests, and to report on actions that affect the negotiated settlement reflected by the MIA and MICSA should be incorporated into M.R.S.A. Title 5, Chapter 9. (Finding 11)
11. Since tribe members are also citizens of the state, the negotiated agreement reflected in the Settlement Acts should be supported and protected by the state and by the OAG. (Findings 11 and 18)
12. The Judiciary Committee of the Maine State Legislature should consider the development of clear responsibilities and reporting standards for the OAG and the MITSC when reviewing any aspect of the MIA or MICSA. This legislation should be introduced in the next legislative session in 2015. Necessary funding should be available to make this possible. (Findings 11 and 18)
13. In order for the MITSC to carry out its statutorily mandated charge, it needs a way to evaluate the impact of legislative, judicial and administrative actions that affect tribal-state relations. A process for regular reporting to the MITSC and information sharing

with the MITSC must be developed that includes the OAG, OPLA, relevant legislative committees, and relevant departments. (Findings 15 and 16)

14. In order to deepen understanding of the Settlement Acts, promote constructive dialogue and advance mutually beneficial solutions, the MITSC should continue its active review of the negotiated agreements as they are reflected in the Settlement Acts, the congressional records and the state records that were produced during the construction of these Acts, and ensuing laws and public policy that affect the federally recognized tribes in Maine. This review, coupled with strong recommendations rooted in conflict resolution and the development of mutually beneficial solutions, should be the foundation of any report or position that the MITSC takes. (Finding 16)
15. The development and implementation of concrete recommendations to address racism are necessary in order to deepen the potential for respectful relationships among all who live in the State of Maine. (Findings 17, 18, 19 and 20)
16. Every effort to maintain peace and respect should be exercised in all public venues and in the areas where tribal fishers work. Policies and procedures backed by the force of law should be legislated by the tribes and the state to accomplish this aim. (Findings 10, 17, 18 and 19)
17. All parties to the Settlement Agreements engage in pragmatic and constructive dialogue, with renewed commitment to advance conflict resolution, openness, negotiations, formal agreements and mutually beneficial solutions for all of the peoples who live within the State of Maine. (Findings 14, 17, 19 and 20)

Appendix I: Addenda

Addendum 1 Report, *Taking of Marine Resources by Passamaquoddy and Penobscot Tribal Members: Report to the Joint Standing Committee on Marine Resources, 119th Maine Legislature by the Maine Indian Tribal-State Commission Pursuant to Public Law 1997, Chapter 708*, 12/15/98

Addendum 2 Meeting minutes, MITSC, 6/7/84

Addendum 3 Meeting minutes, MITSC, 11/21/94

Addendum 4 Memo, Governor Cliv Dore, Passamaquoddy Tribe of Pleasant Point, to Joseph Barnes, Chief of Police, Passamaquoddy Tribe of Pleasant Point, 10/25/96

Addendum 5 Letter, Joseph E. Fessenden, Director of Law Enforcement, Dept. of Marine Resources, to Governor Cliv Dore, Passamaquoddy Tribe of Pleasant Point, 12/3/96

Addendum 6 Bill, LD 273, Resolve, Directing the Commissioner of Marine Resources to Negotiate with the Passamaquoddy Tribe Regarding Fishing Rights, 1/21/97

Addendum 7 Memo, John Kelley, Legislative Analyst, Office of Policy and Legal Analysis, LD 273, Resolve, Directing the Commissioner of Marine Resources to Negotiate with the Passamaquoddy Tribe Regarding Fishing Rights, 2/6/97

Addendum 8 Letter, DMR Commissioner Robin Alden to Governor John Stevens, Passamaquoddy Tribe of Indian Township, and Governor Richard Doyle, Passamaquoddy Tribe of Pleasant Point, 4/24/97 & Accompanying Bill Draft, 4/24/97

Addendum 9 Memo, DMR Commissioner Robin Alden to Sen. Jill Goldthwait, Chair, & Rep. David Etnier, Chair, Joint Standing Committee on Marine Resources, 5/2/97

Addendum 10 Bill draft, An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe, 10/1/97

Addendum 11 Letter, Governor Angus King, State of Maine, to Governor John Stevens, Passamaquoddy Tribe of Indian Township, and Governor Richard Doyle, Passamaquoddy Tribe of Pleasant Point, 10/21/97

Addendum 12 Passamaquoddy Brief, Memorandum in Support of Defendants' Motion to Dismiss, *State v Beal*, 12/13/97

Addendum 13 Decision, *State v Beal*, 3/27/98

Addendum 14 Meeting Minutes, MITSC, 6/5/97

Addendum 15 Memo, Richard S. Cohen, Attorney General, to the Joint Select Committee on Indian Land Claims, 4/2/80

Addendum 16 Letter, Edward B. Cohen, Deputy Solicitor, Office of the Solicitor, US Dept. of the Interior, to John P. DeVillars, Regional Administrator, Environmental Protection Agency Region 1, 9/2/97.

Addendum 17 Memo, Diana Scully, Executive Director, MITSC, to Mike Best, MITSC Commissioner representing the Passamaquoddy Tribe, 3/5/97

Addendum 18 Article, "Tribe seeks to issue own fishing licenses," Bangor Daily News, 1/9/98

Addendum 19 Testimony Sign-In Sheet, Marine Resources Committee, LD 2145, 2/10/98

Addendum 20 Notes Taken by John Kelly, OPLA Analyst, Public Hearing for An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe, 2/10/98

Addendum 21 Bill, An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe

Addendum 22 Summary, Summary of LD 2145: An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe, Office of Policy & Legal Analysis, 1998

Addendum 23 Report, Report of Joint Select Committee on Indian Land Claims, 4/2/80

Addendum 24 Memo, Sen. Susan Longley, Senate Chair, & Rep. Richard Thompson, House Chair, Judiciary Committee, to Sen. Jill Goldthwait, Sen. Chair, & Rep. David Etnier, House Chair, Marine Resources Committee, re: Amendments to the Act to Implement the Maine Indian Land Claims Settlement, 2/25/98

Addendum 25 Bill Draft, Revised version of LD 2145; Title 12; no tribal ratification based on 2/26/98 meeting of the Marine Resources Committee subcommittee, 3/2/98

Addendum 26 Memo, John Kelley, Legislative Analyst, Marine Resources Committee, to Members, LD 2145 Subcommittee, 3/9/98

Addendum 27 Notes, John Kelley, Legislative Analyst, Marine Resources Committee, 3/10/98

Addendum 28 Memo, John Kelley, Legislative Analyst, Marine Resources Committee, to Greg Sample, attorney, Drummond Woodsum, 3/12/98

Addendum 29 Legislative Record, House, 3/23/98

Addendum 30 Legislative Record, Senate, 3/24/98

Addendum 31 Memo, Jon Clark, Office of Policy & Legal Analysis, to Susan Johnson, NCSL, 6/5/98

Addendum 32 Letter, Janet Mills, Maine Attorney General, to Patrick Keliher, Commissioner of Marine Resources, 3/12/13

Addendum 33 Letter, Michael G. Rossetti, Akin Gump, to Janet Mills, Maine Attorney General, 2/11/14

Addendum 34 Letter, Joseph Socobasin, Sakom, Passamaquoddy – Indian Township, & R. Clayton Cleaves, Sakom, Passamaquoddy – Pleasant Point, to Sen. Christopher Johnson, Sen. Chair, & Rep. Walter Kumiega III, House Chair, Committee on Marine Resources, 2/18/14

Addendum 35 Press Release, Passamaquoddy Tribe, 4/4/14

Addendum 36 Meeting minutes, MITSC, 6/12/00

Addendum 37 Meeting minutes, MITSC, 2/26/14

Appendix II

Maine Indian Claims Settlement Act (MICSA) 25 U.S.C. §1721-1735
http://www.mitsc.org/documents/33_FedSettActALL.pdf

The federal law passed to implement the Maine Indian Claims Settlement. It ratified the Maine Implementing Act and specified that when conflicts arise between the state act and the federal act, the federal act would prevail. Section 25 U.S.C. § 1725(e) gave federal consent to the State of Maine to amend the MIA with respect to the Passamaquoddy Tribe or Penobscot Nation provided the affected tribe or nation agrees with the change.

Maine Implementing Act (MIA) M.R.S.A Title 30, Chapter 601
http://www.mitsc.org/documents/38_2010-10-6MIAtitle30ch601.pdf

The state law enacted in April 1980 that explicates the jurisdictional relationship between the Houlton Band of Maliseet Indians, Passamaquoddy Tribe, Penobscot Indian Nation, and State of Maine under the Maine Indian Claims Settlement. The MIA took effect upon passage of the MICSA.

Public Law, c. 708 LD 2145 *An Act Concerning the Taking of Marine Resources by Members of the Passamaquoddy Tribe*

http://www.mitsc.org/documents/140_1997_PL_c708.pdf

Legislation sponsored by Passamaquoddy Tribal Representative Fred Moore to resolve the conflict between the Passamaquoddy Tribe and State of Maine concerning saltwater fishing. The original bill was dramatically altered during the legislative process and ultimately contravened the required provisions to amend the MIA that are outlined in the MICSA.

Public Law, c. 84 Second Regular Session – 1995 LD 1667 *Resolve, To Improve Tribal and State Relations*

http://www.mitsc.org/documents/144_1995RES_c084creationTaskFoceonTribal-StateRelations.pdf

This legislation directed MITSC to create the Task Force on Tribal-State Relations. The Task Force was charged with exploring ways to improve the relationship between the state and MITSC and the state and federally recognized Indian Tribes; determining the appropriate role for the Aroostook Band of Micmacs and the Houlton Band of Maliseet Indians in the MITSC; evaluating the general effectiveness of the MITSC; engaging in other activities to improve tribal-state relations; and developing recommendations.

At Loggerheads—the State of Maine and the Wabanaki Final report of the Task Force on Tribal-State Relations

http://www.mitsc.org/documents/77_1997-1-15AtLoggerheads-TheStateofMaineandtheWabanaki.pdf

At Loggerheads - the State of Maine and the Wabanaki is the final report of the Task Force on Tribal-State Relations. The Task Force on Tribal-State Relations, created by the 117th Maine Legislature, worked from June 1996 through early January 1997 to explore ways of improving the tribal-state relationship and the effectiveness of the MITSC.

Public Law, c. 45 First Special Session – 1997 LD 1269 *Resolve, to Foster the Self-governing Powers of Maine's Indian Tribes in a Manner Consistent with Protection of Rights and Resources of the General Public*

http://www.mitsc.org/documents/145_1997_RES_c045LD1269.pdf

The legislation generated by the Task Force on Tribal-State Relations created in 1996. It directed MITSC to 1) review the civil laws of the State of Maine to determine the manner and extent to which those laws, as enforced, constrict or impinge upon the best interests of children with respect to: traditional culture and way of life as practiced in tribal communities; the ability of tribes to regulate their members, lands, schools and other cultural institutions and communities; and the respect and dignity appropriately given to all individual citizens in the state and members of the tribes; 2) conduct the study over a period of 4 years notably considering in part the concerns that gave rise to the bill proposed by the Passamaquoddy Tribe to rescind section 6204 of the MIA; 3) report its findings 12/15/97, 12/15/98, and 12/15/00; and 4) convene an Annual Assembly of Governors and Chiefs;

***State of Maine v. Beal*, 4th Dist. Ct. No. 96-957 *et seq*.**

http://www.mitsc.org/documents/139_1998-3-27StatevBeal.pdf

The decision of Maine District Court Judge John Romei to reject a motion to dismiss filed by the Passamaquoddy Tribe on behalf of 13 Passamaquoddy fishers who were charged with a number of violations of state law related to saltwater fishing.

***Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999)**

http://www.mitsc.org/documents/142_1999-1-19PenobscotNationvFellencer1stCircuitdecision.pdf

Fellencer was an employment case where the Maine Superior Court ruled that employment matters did not fall under the internal tribal matters provisions of the MIA. On January 19, 1999, *Fellencer* was reversed on appeal to the U.S. Court of Appeals,

First Circuit, and the case was remanded for the entry of judgment (reversed) in favor of the Penobscot Indian Nation.

Penobscot Nation v. Fellencer, 999 F. Supp. 120 (D. Me. 1998)

http://www.mitsc.org/documents/143_1998-3-13PenobscotNationvFellencerUSDistrictCourtdecision.pdf

Judge Morton Brody's decision to uphold the Maine Superior Court ruling that the Maine Human Rights Commission had jurisdiction over an employment dispute the Penobscot Nation had with a former employee. The First Circuit Court of Appeals overturned this ruling on January 19, 1999.

5 M.R.S.A. Chapter 9 Attorney General

http://www.mainelegislature.org/legis/statutes/5/title5ch9sec0.html

The portion of Maine law that deals specifically with the duties and responsibilities of the Office of the Maine Attorney General.